

NO. PD-0429-16

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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

RUSSELL LAMAR ESTES,

Appellant,

v.

THE STATE OF TEXAS,

Appellee

On Petition for Discretionary Review from the 2nd Court of Appeals
Case No. 02-14-00460-CR

REPLY BRIEF OF RUSSELL LAMAR ESTES

– ORAL ARGUMENT NOT PERMITTED –

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| VS. | § | CRIMINAL APPEALS |
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| STATE OF TEXAS | § | IN AUSTIN, TEXAS |

APPELLANT'S REPLY BRIEF

To the Honorable Judges of the Court of Criminal Appeals:

Russell Estes, Appellant and Petitioner, respectfully submits this brief in reply to the State's Brief on the Merits of Appellant's Petition for Discretionary Review. Because Appellant believes his arguments on Ground Two¹ were fully developed in his Brief on the Merits, and the arguments made by the State in response need no reply, this Reply Brief only addresses the arguments made by the State on Ground One of Appellant's Petition for Discretionary Review².

STATEMENT OF THE CASE

Appellant was convicted of five counts of sexual assault bigamy and two

¹ Ground Two of Appellant's Petition for Discretionary Review asked, "Was it error for the Court of Appeals to affirm Appellant's sexual assault convictions as second-degree felonies and remand those charges to the trial court for a new trial on punishment, rather than order the prosecution of Appellant dismissed or remand the charges to the trial court to enter an order dismissing the prosecution?"

² Ground One asked, "Should Appellant's equal protection claim be reviewed under strict scrutiny?"

counts of indecency with a child. (RR6, 195; CR, 236-44). The jury assessed Appellant's sentence at twelve years in the Texas Department of Criminal Justice on each count of sexual assault bigamy and ten years on each count of indecency with a child, with community supervision recommended on the latter. (CR, 254-260; RR6, 104).

The Second Court of Appeals affirmed the trial court's judgments of conviction on Appellant's charges for indecency with a child in all respects, modified the trial court's judgments on Appellant's charges for sexual assault to reflect convictions for second-degree felonies, reversed the trial court's judgments on Appellant's charges for sexual assault as to punishment and remanded the sexual assault cases to the trial court for a new trial on punishment only. *Estes v. State*, 487 S.W.3d 737, 762 (Tex. App.—Fort Worth 2016, pet. granted) (citation omitted). The State filed a Petition for Discretionary Review on April 21, 2016, and Appellant filed a Petition for Discretionary Review on April 28, 2016. On September 14, 2016, this Court granted the State's Petition for Discretionary Review and granted Appellant's Petition for Discretionary Review on Grounds One and Two.³ Both the State and Appellant have since submitted briefs on the merits of all grounds for review.

³ Appellant presented three questions or grounds for review in his Petition. See Appellant's Pet. for Discretionary Review.

REPLY ISSUE PRESENTED

Strict scrutiny is the appropriate level of review to apply to Appellant's equal protection claim.

ARGUMENT

Appellant was convicted of five counts of sexual assault bigamy under [Tex.](#)

[Penal Code Ann. § 22.011\(f\)](#), which provides:

An offense under this section is a felony of the second degree, except that an offense under this section is a felony of the first degree if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01.

Under Section 25.01, an individual commits an offense if he is legally married and he:

(A) purports to marry or does marry a person other than his spouse in this state, or any other state or foreign country, under circumstances that would, but for the actor's prior marriage, constitute a marriage; or

(B) lives with a person other than his spouse in this state under the appearance of being married

[Tex. Penal Code Ann. § 25.01\(1\) \(West Supp. 2016\)](#). In the trial court and on appeal, Appellant argued *inter alia* that the constitutionality of the statute as applied to him should be reviewed using the “strict scrutiny” standard⁴ because Section 22.011(f) operated to treat Appellant and his acts more severely than if he were an unmarried person accused of doing the exact same things to the exact same complainant and thereby impinged on Appellant’s fundamental right to marry. First Am. Br. of

⁴ Under this standard of review, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its disparate treatment of Appellant “has been precisely tailored to serve a compelling governmental interest.” See [Plyler v. Doe](#), 457 U.S. 202, 217 (1982).

Russell Lamar Estes on the Merits, pp. 15-20. The State counters that the “rational basis” test⁵ is the proper analysis because Appellant did not fall within a suspect class and this statutory application did not interfere with a fundamental right. State’s Br. on the Merits of Appellant’s Pet. for Discretionary Review, pp. 5-6. Relying on *Califano v. Jobst*, 434 U.S. 47, 53–54 (1977), and the initial (subsequently vacated) decision of this Court in *James v. State*, 772 S.W.2d 84, 92 (Tex. Crim. App.), *vacated and remanded*, 493 U.S. 885 (1989), as well as a Missouri Supreme Court opinion⁶, the State argues that marital status is not a suspect classification requiring strict scrutiny. State’s Br. at 6. As explained herein, however, whether a classification based on the exercise of a fundamental right is “a suspect classification” for purposes of an equal protection analysis is not the only inquiry for this Court to make in determining the level of scrutiny required.

The resolution of this issue turns on a single question: What does it mean to “impinge upon” the exercise of a fundamental right? *Black’s* defines “impinge” as “to encroach or infringe (*on or upon*).” *Black’s Law Dictionary* 822 (9th ed. 2009) (emphasis in original). When articulating the criteria for determining what level of scrutiny applies to a particular equal protection claim, the U.S. Supreme Court has

⁵ To withstand equal protection review under this more deferential standard, the challenged legislation “must be rationally related to a legitimate governmental purpose.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

⁶ *Glossip v. Missouri Dept. of Transp. & Highway Patrol Employee’s Ret. Sys.*, 411 S.W.3d 796 (Mo. 2013).

apparently used the term “impinges upon” (or “impinges on”) interchangeably with “penalize[s]”⁷, “restricts”⁸, “interferes with”⁹, “infringes”¹⁰ and “burdens”¹¹.

In application, though, the Court has subjected a classification that merely “touches on” a fundamental right to strict scrutiny. *Shapiro*, 394 U.S. at 638. There is no question that the prosecution and conviction of Appellant under Section 22.011(f) touches on his right to marry. Arguably, the application of the statute to Appellant also penalizes, infringes and burdens his exercise of this fundamental right by making what would be a second-degree felony if Appellant were not married a first-degree felony because of his marital status. Thus, however narrowly or broadly this Court chooses to interpret the applicable case law, Appellant’s equal protection claim clearly falls within the category of cases where strict scrutiny is required. The State argues that this statute’s application “did not interfere with” Appellant’s fundamental rights, State’s Br. at 7, but that is not the only criterion for this Court to consider in determining the level of scrutiny required. The application of Section 22.011(f) to Appellant in this case impinges upon his fundamental right to marry, and therefore the State should be required to demonstrate that its action was precisely tailored to serve a compelling governmental interest. *See Plyler*, 457 U.S. at 216-

⁷ *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

⁸ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978).

⁹ *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

¹⁰ *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993).

¹¹ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

217; *Zablocki*, 434 U.S. at 383.

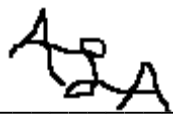
CONCLUSION AND PRAYER

Because Section 22.011(f) of the Texas Penal Code, as applied to Appellant in this case, provides dissimilar treatment for married and unmarried persons who are similarly situated and impinges on Appellant's exercise of his constitutional right to marry, this Court should apply strict scrutiny when reviewing Appellant's equal-protection challenge to the constitutionality of the statute. The Court of Appeals correctly concluded that, under the circumstances of this case and as applied to Appellant, Section 22.011(f) violates equal protection, but the court erred in reforming Appellant's convictions under the statute as second-degree felonies and remanding those charges to the trial court for a new trial on punishment only. Appellant prays that this Court: (1) affirm the judgment of the Court of Appeals in part; (2) reverse the part of the judgment of the Court of Appeals modifying the trial court's judgments on the charges for sexual assault to reflect convictions for second-degree felonies, reversing the trial court's judgments on the charges for sexual assault as to punishment only and remanding the sexual assault cases to the trial court for a new trial on punishment only; and (3) either order the prosecution of Appellant on the sexual assault bigamy charges dismissed or remand this case to the trial court to enter an order dismissing the prosecution.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief was electronically served upon Steven W. Conder, Assistant Criminal District Attorney, Tim Curry Criminal Justice Center, 401 W. Belknap Fort Worth, Texas 76196, and Lisa McMinn, State Prosecuting Attorney, via e-mail to ccaappellatealerts@tarrantcountytexas.gov and information@spa.texas.gov, respectively, on November 17, 2016.

/s/ Adam L. Arrington
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I certify that this document complies with Tex. R. App. P. 9.4, specifically using a conventional typeface no smaller than 14-point for text and 12-point for footnotes, and contains 1,194 words, excluding those parts specifically excepted by Tex. R. App. P. 9.4(i)(1), as computed using Microsoft Word.

/s/ Adam L. Arrington
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